Supreme Court, U.S.
FILED
JUL 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

Term

No. 2931

THE NATIONAL DRYING MACHINERY COMPANY,
Petitioner,

vs.

JACK ACKOFF and NATIONAL DRYER MANUFACTURING CORPORATION, and NATIONAL DRYER SALES CORPORATION (World Dryer Corporation, Successor in Interest; Substituted),

Respondents.

PETITION OF THE NATIONAL DRYING MACHINERY COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

LOUIS NECHO,
1521 Walnut Street,
Philadelphia 2, Pennsylvania,
Counsel for Petitioner.

TABLE OF CONTENTS OF BRIEF

	PAGE
I. The Opinions Below	2
II. Jurisdiction	2
III. Questions Presented	2
IV. Statute Involved	4
V. Statement of the Case	4
VI. Reasons Why Writ Should Be Granted	5
VII. Argument	5

TABLE OF CASES

Christensen Engineering Co. vs. Westinghouse Air Brake Co., 135 F. 774	5
Krentler Arnold vs. Leman (2 Cir.), 50 F(2) 699 (reversed)	6
Leman vs. Krentler Arnold, 284 U. S. 448	5, 6
U. S. vs. United Mine Workers, 330 U. S. 258	6

STATUTES CITED

15 U. S. C. 1117	3, 4
28 U. S. C. 1254	2

TABLE OF CONTENTS OF APPENDIX

PAGE

Opinion of the District Court Sur Contempt Proceedings (Hon. Kirkpatrick, Ch. J.) 9

Opinion of The District Court Sur Re-argument Sur Contempt Proceedings (Hon. Kirkpatrick, Ch. J.) 10

Opinion of The Court of Appeals (per Hon. Hastie, C. J.) 12

Opinion of The Court of Appeals Sur Petition for Rehearing (per curiam, Hon. Biggs, Chief Judge and Hon. Maris, Senior Judge, dissenting) 17

IN THE

SUPREME COURT OF THE UNITED STATES.

Term

No.

THE NATIONAL DRYING MACHINERY COMPANY,
Petitioner,

vs.

JACK ACKOFF and NATIONAL DRYER MANUFACTURING CORPORATION, and NATIONAL DRYER SALES CORPORATION (World Dryer Corporation, Successor in Interest, Substituted),
Respondents.

PETITION OF THE NATIONAL DRYING MACHINERY COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of The National Drying Machinery Company for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit respectfully represents:

I. OPINIONS BELOW.

The opinions of the District Court and the opinions of the Circuit Court of Appeals Sur Contempt Proceedings, are unreported. Copies of all of said opinions are appended hereto.

II. JURISDICTION.

Grounds on which jurisdiction of this Court are invoked are:

A. The Court of Appeals entered the judgment sought to be reviewed on May 1, 1957.

B. Petition for Re-hearing was filed and the same was denied, per curiam, on June 13, 1957, with Hon. Biggs, Ch. C. J., Hon. Maris, C. J., dissenting.

C. The statutory provision which is believed to confer jurisdiction on this Court is the Act of June 25, 1948, ch. 646; Stat. 928; 28 U. S. C. 1254.

D. The courts below had jurisdiction because a Federal Statute was involved.

III. THE QUESTIONS PRESENTED.

For the purpose of this Petition, only the following question is presented, namely:

Does the decision of this Court in *Leman vs. Krentler*, 284 U. S. 448, 455, approve the award of the profits which a

contemnor derives from the contemptuous conduct even in the absence of evidence of actual monetary loss on the part of Complainant?

In the event that this Court should graciously grant a writ of certiorari, Petitioner begs leave to present, and argue, the following additional questions, which are thought to be presently unsettled, and clarification of which is thought to be in the public interest.

These questions are

1. Does 15 U. S. C. 1117 limit the award of the profits of an infringer, or a contemnor to cases where Complainant shows actual financial loss caused by the infringement or by the contemptuous conduct?

2. Is it good public policy to limit the liability of a contemnor to the payment of nominal costs and a counsel fee commensurate with the very small amount of work involved in a contempt proceeding and thus encourage a contemnor to continue to use the mark if the profits derivable from such infringement exceed the trivial costs and the small counsel fee he will have to pay when, and if, he is cited?

3. Is it equitable to compel the owner of the mark to continue spending time and money in watching for infringements all over the country and to continue bringing and prosecuting contempt proceedings?

4. Is it good public policy to emasculate an injunction and thus lessen the respect of contemnors for the dignity of the Courts?

5. Does dilution of a mark by its continued use by a contemnor reduce the value of the mark and, if so, is it equitable to refuse to compensate the trademark owner merely because it is impossible to ascertain the exact degree of the damage caused by the dilution and to translate it into money?

IV. THE STATUTE INVOLVED.

For the purpose of this Petition, no statute is involved. But, if this Court should graciously grant a writ of certiorari, 15 U. S. C. 1117 will be relied on.

V. STATEMENT OF THE CASE.

Petitioner sued Respondents for infringement of its mark, which is registered on the Principal Register. The District Court found for Petitioner and enjoined Respondents, 125 F. Supp. 389. Respondents appealed and the Circuit Court of Appeals for The Third Circuit affirmed the District Court, 228 F(2) 349.

On or about the 21st day of August, 1956, Petitioner cited Respondents in Civil Contempt and, on or about September 25, 1956, the District Court adjudged Respondents to be in contempt and fined them $5,000.00 to the use of Petitioner. Respondents orally asked for re-argument and the District Court, in its Opinion Sur Re-argument, affirmed its previous judgment and gave Respondents the option to pay the fine of $5,000.00 to Petitioner or to account for profits in the event that Respondents felt that their profits were less than the sum of $5,000.00.

From this judgment of the District Court, Respondents appealed to the Court of Appeals for the Third Circuit which, in an opinion dated May 1, 1957, reversed the District Court.

On or about May 15, 1957, Petitioner filed a Petition for Re-hearing which was denied, per curiam, with Chief Judge Biggs and Senior Judge Maris dissenting.

VI. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A. The decision of the majority of the Court of Appeals conflicts with the decision of this Court in the *Leman-Krentler* case, supra.

B. The law of the case, as enunciated by the majority of the Court of Appeals for the Third Circuit, conflicts with the law of the case as enunciated in the Second Circuit pursuant to the mandate of this Court in the *Leman Krentler* case, supra.

VII. ARGUMENT.

In its Opinion Sur Re-argument, the District Court held that:

> "* * * the decision of the Supreme Court in Leman vs. Krentler, 284 U. S. 448, leaves no possible doubt of the power of the Court in a civil contempt proceeding for infringement to order the Defendants to pay to the Plaintiff as compensation for invasion of its right, the amount of profits realized by the Defendants from sales made in violation of the injunction whether it be called a fine or something else * * * If a compensatory fine or an award of profits as damages cannot be imposed, the Defendants could go on violating the injunction as long as they found it profitable to do so without the risk of any penalty except now and then the imposition of a moderate attorney's fee and costs, this Court will not ascribe to any such preposterous position."

In reversing the District Court, the Court of Appeals relied, primarily, on *Christensen Engineering Co. vs. Westing-*

house Air Brake Co., 1905, 135 Fed. 774, 782, and secondarily on *United States vs. United Mine Workers*, 1947, 330 U. S. 258, 303.

The *Christensen Engineering* case, supra, on which the majority of the Court of Appeals primarily relied, was the basis of the decision in the case of *Krentler vs. Leman* (2 Cir.), 50 F(2) 599, which was reversed by the decision of this Court and *Leman vs. Krentler*, supra. In the language of Honorable Judges Biggs and Maris, the *Christensen* case was, "sub silentio", overruled by the decision of this Court in the *Leman-Krentler* case. Therefore, to the extent that the decision of the majority of the Court of Appeals rests on the overruled *Christensen* case, it is untenable.

In the *United Mine Workers* case, supra, on which the majority of the Court secondarily relied, this Court, without any reference to actual loss suffered, affirmed the $10,000.00 fine against John L. Lewis, in toto, and, without any reference to any evidence as to the actual loss suffered, this Court affirmed a fine of $700,000.00 against the union and gave the union a chance to save the balance of $2,800,000.00 by returning to work promptly. Again, in the language of Honorable Judges Biggs and Maris, the *United Mine Workers* case did not overrule the *Leman-Krentler* case and was not dispositive of the civil contempt issue. Therefore, to the extent that it is based on the *United Mine Workers* case, which is clearly distinguishable and which is not dispositive of the issue, the decision of the majority of the Court of Appeals is untenable.

The Court of Appeals dismissed the decision of this Court in the *Leman-Krentler* case in the following language:

> "* * * But, in our view, the Leman case does not relieve Complainant of showing that the contemptuous conduct did, in fact, have substantial injurious effect upon his economic interest * * *."

In the last analysis, this is the ruling which is sought to be clarified by an explicit affirmance or reversal by this Court.

Since this is a matter of construction, which is the exclusive prerogative of this August Body, Petitioner will not venture an opinion. Instead, and by reference, Petitioner adopts the dissenting opinion of the Hon. Judges Biggs and Maris of the Court of Appeals, and the opinion of the Judge in the District Court as its argument.

Had Hon. Judges Biggs and Maris sat on the appeal, the decision would have been different. This creates the impression in the public mind that the Petitioner lost, not because of the law, but because of "luck". This is not a healthy impression and should not be allowed to stand. True, this Honorable Court occasionally splits on certain issues, but, since there is no higher authority, such decisions have to stand until the test of time sustains, modifies, or reverses the minority opinion. This is not true of a split decision in a lower court which can be clarified by this Court, and it is submitted that it is in the public interest to settle the issue, one way or another. Otherwise, there will be other conflicting decisions, and dissenting opinions, which, sooner or later will have to be settled by this Court, and it is submitted that, if this issue is going to be settled sooner or later, it might as well be settled now so that the lower courts, the public and the bar will know just what the law is.

In conclusion, Petitioner respectfully suggests that, due to the conflict of opinion between the Courts of Appeal for the Second and Third Circuits, due to the fact that the decision of the Court of Appeals for the Third Circuit is split, with the two senior judges dissenting, and due to the importance of the question involved, this Petition for a writ of certiorari merits the favorable consideration of this Honorable Court.

Since the SOLE question is whether, or not, the decision of this Court in the Leman-Krentler case permits the award of the profits of a Contemnor in the absence of a showing

of damages by Complainant, it is respectfully suggested that this issue can be disposed of summarily.

Respectfully submitted,

LOUIS NECHO,
Counsel for Petitioner.

Appendix

[OPINION OF THE DISTRICT COURT] SUR CONTEMPT PROCEEDINGS.

The decree enjoined National Dryer Manufacturing Corporation and National Dryer Sales Corporation (hereinafter referred to as defendants) "from directly or indirectly selling or in any way making or dealing in drying machines * * * under a business name which includes the word National."

The defendants are unquestionably in contempt. Their use of the name "National Dryer" in letters to customers after the decree became final, is not denied. There might be some small excuse for that, although the defendants had plenty of time to make all the necessary arrangements to discontinue the use of the name immediately upon the decree becoming further unappealable by the Supreme Court's denial of certiorari. Far more serious is the defendants' conduct in adopting a deliberate policy which they contend is their right and which they intend to pursue until the Court rules it to be a violation of the injunction. This policy is to continue to use the word "National", not only on letterheads in correspondence and in advertising matter, but also on name plates of the drying machines which they sell in connection with their present corporate name as follows: "World Dryer Corporation, formerly 'National'." In all uses the word is prominently featured. On the name plates all the printing is in black letters except the words "Formerly National" which stand out in bright red.

The defendants' course of conduct is a violation of plain language of the decree, clearly intended to thwart its purpose. The whole purpose of the program is to continue to make use of whatever advantages they obtained from the use of the plaintiff's trade name. So far from distinguishing themselves from the plaintiff as manufacturers of their product, the literature and name plates serve to identify the

two in the minds of the public. The defendants are saying to the public, particularly their former customers, in effect "we are the same people whom you dealt with and whose products you bought under the name 'National' ". There is nothing to suggest that they are a distinct concern from the plaintiff's. The designation "World Dryer Corporation, formerly 'National' " is, if anything, more harmful to the plaintiff who uses the trademark "National Dryer" because one might quite possibly get the impression that the plaintiff had gone into reorganization or that the use of the word "National" as a trade-mark had been abandoned.

The defendants urge: First, that they are not in competition with the products of the plaintiff. This is true, they are not in competition at the present time but the injunction was granted over that very defense which was strenuously urged at the trial and it is difficult to see how the defendants could have imagined that that fact entitles them to favorable consideration now. Second, the defendants assert that they have not been palming off their hand dryers as products of the plaintiff. Whether one calls it "palming off" or something else, the fact is that they were and still are appropriating a name which belongs to the plaintiff and are using it in connection with the sale of their products.

The defendants are adjudged in contempt and are ordered to pay to the plaintiff a fine in the amount of $5,000 together with all the costs of this proceeding and an attorney's fee of $1,000.

An appropriate order may be submitted.

OPINION OF THE DISTRICT COURT ON REARGUMENT

KIRKPATRICK, Ch. J.

In this case the Court issued its decree enjoining the defendants from selling their machines under any business name which included the word "National", the plaintiff's trademark. Thereafter, upon a showing of undisputed facts,

the Court adjudged the defendants in contempt and ordered them to pay to the plaintiff a fine in the amount of $5,000., together with costs and an attorney's fee of $1,000. The defendants now ask the Court to strike off the fine, taking the position that, inasmuch as the plaintiff has not produced evidence of monetary loss or damage to it occasioned by the defendants' violations, the Court erred in imposing it. The Court ordered a reargument upon the point.

In issuing the injunction, the Court found that there was no present competition between the parties, but injunctive relief was granted on the ground that the defendants were appropriating the plaintiff's property and that the plaintiff's right to use its trademark in a business which would compete with the defendants', when and if it desired to do so, had been invaded and its value impaired. The Court of Appeals apparently took the same view because in a per curiam opinion, 228 F. 2d 349, it affirmed the judgment, noting that there was no proof that the plaintiff had suffered damage.

Whether or not the Court has power to impose purely punitive damages, as the plaintiff contends, the decision of the Supreme Court in Leman v. Krentler Arnold Co., 284 U. S. 448, leaves no possible doubt of the power of the Court in a civil contempt proceeding for infringement to order the defendants to pay to the plaintiff, as compensation for the invasion of its right, the amount of profits realized by the defendants from sales made in violation of the injunction, whether it be called a fine or something else. In this case the Court did not order an accounting of profits but imposed a fine intended as compensation. The amount of the fine may stand as the Court's estimate of a proper figure, representing less than the defendants' profits. If the defendants believe that it is excessive, they may, not later than ten days from the entry of this order, apply to the Court to order an accounting of profits. If no such application is made, the Court will enter an order, upon this reargument, confirming its original imposition of the fine, attorney's fee and costs.

In the original decree which enjoined the defendants, the Court refrained from making an award of damages in view of what at that time appeared to the Court to be the equities of the whole case. Since that time, however, the defendants have engaged in a course of deliberate and continued violation of the Court's injunction and the equities have been reversed.

In granting the injunction the Court said that the injunction was all that was needed to give complete relief but the Court had in mind something more than a mere piece of paper with the words of a decree printed on it. If the position taken by the defendants is correct, the Court would be without power to take any effective measures to put an end to the continued infringement. Concededly, the Court may not impose imprisonment in civil contempt proceedings except where the contempt consists in a refusal to obey a command to take some affirmative action. If a compensatory fine or an award of profits as damages cannot be imposed, the defendants could go on violating the injunction as long as they found it profitable to do so without running the risk of any penalty except, now and then, the imposition of a moderate attorney's fee and costs. This Court will not subscribe to any such preposterous position.

An appropriate order may be submitted.

OPINION OF THE COURT OF APPEALS.

(Filed May 1, 1957.)

HASTIE, *Circuit Judge.*

This appeal arises out of a civil contempt proceeding instituted after final decree in a trademark infringement case. The final decree had been approved by this court, 228 F. 2d 349, affirming 127 F. Supp. 389. Several months

later the successful plaintiff formally charged defendants with willful violation of certain prohibitory provisions of the decree which had enjoined defendants from selling drying machines "under a business name which includes the name 'National'."

What the defendants have done since the decree, according to the present findings of the district court, ". . . is to continue to use the word 'National', not only on letterheads in correspondence and in advertising matter, but also on name plates of the drying machines which they sell in connection with their present corporate name as follows: 'World Dryer Corporation, formerly "National".' In all uses the word is prominently featured. On the name plates all the printing is in black letters except the words 'Formerly National' which stand out in bright red."

The district court held that this action constituted civil contempt and ordered the defendants to ". . . pay Plaintiff a fine in the total sum of $5,000.00, a counsel fee in the sum of $1,000.00 and costs of the contempt proceeding with interest at 6% from November 20th, 1956, until the said sums are paid." However, the petition which initiated these contempt proceedings contained no allegation that the petitioner had suffered any damage as a result of the violation of the injunction. At the hearing there was neither proof nor tender of proof as to how much, if anything, plaintiff was entitled to recover.

The present appeal is bottomed upon this admitted failure to claim or prove damage and a legal argument that no punitive award, but only a sum to compensate for loss, may be granted to the complainant in a civil contempt proceeding.

Appellant's basic legal position is sound. Fifty years ago, when the courts were not yet agreed as to the scope of civil contempt, the Circuit Court of Appeals for the Second Circuit made a very clear statement of the position which, as we read the cases, has since won the day:

> ". . . It is obvious that a fine exceeding the indemnity to which the complainant is entitled is purely punitive,

and, nothwithstanding the foregoing precedents to the contrary, we think that when it is imposed by way of indemnity to the aggrieved party it should not exceed his actual loss incurred by the violation of the injunction, including the expenses of the proceedings necessitated in presenting the offense for the judgment of the court. We are also of the opinion that when the fine is not limited to the taxable costs it should not exceed in amount the loss and expenses established by the evidence before the court. Unless it is based upon evidence showing the amount of the loss and expenses, the amount must necessarily be arrived at by conjecture, and in this sense it would be merely an arbitrary decision. Another reason why it should be based upon evidence is that otherwise the question of its reasonableness cannot be re-examined upon an appeal from a final decree in the cause, and the appellate court would have to treat the fine as a purely arbitrary one, or deny to the appellant his right of review." *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 1905, 135 Fed. 774, 782.

Attesting to present day acceptance of this rationale are assertions in two often cited opinions of the Supreme Court. In *United States v. United Mine Workers*, 1947, 330 U. S. 258, 303-4, Chief Justice Vinson defined the scope of civil contempt as follows: ". . . Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained . . . Where compensation is intended, a fine is imposed payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, . . ." Substantially the same thing had already been said by the Court in *Gompers v. Bucks Stove & Range Co.*, 1911, 221 U. S. 418, 444: ". . . The only possible remedial relief for such dis-

obedience [violating a prohibitory injunction] would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience."

It is difficult to square the $5,000.00 award in this case with such authoritative assertions of the limitations of legal power in civil contempt cases. Recognizing this problem, the district court ordered a reargument after its adjudication of contempt and fine had been announced in a memorandum opinion. Thereafter, the court restated its position in a second memorandum opinion, which reads in part as follows:

> "Whether or not the Court has power to impose purely punitive damages, as the plaintiff contends, the decision of the Supreme Court in *Leman v. Krentler Arnold Co.*, 284 U. S. 448, leaves no possible doubt of the power of the Court in a civil contempt proceeding for infringement to order the defendants to pay to the plaintiff, as compensation for the invasion of its right, the amount of profits realized by the defendants from sales made in violation of the injunction, whether it be called a fine or something else. In this case the Court did not order an accounting of profits but imposed a fine intended as compensation. The amount of the fine may stand as the Court's estimate of a proper figure, representing less than the defendants' profits. If the defendants believe that it is excessive, they may, not later than ten days from the entry of this order, apply to the Court to order an accounting of profits. If no such application is made, the Court will enter an order, upon this reargument, confirming its original imposition of the fine, attorney's fee and costs."

We think this was error. Whether an award in civil contempt be measured in terms of a plaintiff's loss or a defendant's profit, such an award, by very definition, must be an attempt to compensate plaintiff for the amount he is out-of-pocket or for what defendant by his wrong may be

said to have diverted from the plaintiff or gained at plaintiff's expense. Unless this limitation is recognized, a requirement that one party turn his profits over to his adversary itself becomes a punitive rather than a compensatory imposition.

Moreover, although we appreciate the purpose of the district court to dispose of this matter in a way which would be both expeditious and fair to the parties, we do not approve the entering of judgment in a round figure without proof and thereafter giving the defendant a chance to show that the award should be in some smaller amount. Though such an award is made against a wrongdoer adjudged guilty of civil contempt, we think the burden of showing what amount, if anything, the plaintiff is entitled to recover by way of compensation, cannot properly be shifted in this way from plaintiff to defendant.

In reaching this conclusion we have not overlooked the district court's reliance upon *Leman v. Krentler-Arnold Hinge Last Co.*, 1932, 284 U. S. 448, as support for its disposition of the present proceeding. True, that case sanctions the use of profits yielded by contemptuous conduct in the measurement of the injury caused by a patent infringement. But in our view the *Leman* case does not relieve the complainant of showing that the contemptuous conduct did, in fact, have substantial injurious effect upon his economic interest. This conception is particularly important here because in the original disposition of the present petitioner's trademark infringement claim it appeared to the district court that the plaintiff had suffered no economic injury from the trademark infringement and that there was not "any real danger of the plaintiff's product being brought into disrepute by the defendant's use of the name. . . ." 129 F. Supp. at 391. The court added that "the case comes down to the question whether the trademark owner will be protected in a field which he has not actually entered. . . ." On appeal this court said "the trial court is correct in its finding that there is no proof of any damages. . . ." 228 F. 2d at 350.

There is no suggestion in the present proceeding that this absence of economic injury has been changed by the contemptuous conduct of the defendants. The district court does say that the "equities" have been changed by this willful misconduct. But there can be no "equity" in a compensatory award except as it provides a fair equivalent for some loss. If, on the other hand, the reference to changed "equities" means that the defendant deserved punishment for a willful wrong, the procedure must be that of criminal contempt rather than the employment of civil contempt as a punitive device.

The judgment will be vacated and the cause remanded with directions to modify the award by eliminating the $5,000.00 item. All of the equities considered, neither party will be allowed costs in this court as against the other.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[OPINION OF THE COURT OF APPEALS SUR] PETITION FOR REHEARING.

(Filed June 13, 1957.)

PER CURIAM.

Appellee has urged reconsideration of our decision in this case arguing that it is in conflict with the decision of the Supreme Court in *Leman v. Krentler-Arnold Co.*, 1932, 284 U. S. 448. This contention has been fully considered by the entire court. The petition for rehearing is hereby denied.

BIGGS, *Chief Judge*, dissenting.

I am of the view that the decision in Leman v. Krentler-Arnold Co., 284 U. S. 448 (1932), permits the plaintiff in a civil contempt proceedings to be compensated without showing actual loss where, as here, an injunction prohibiting a course of action has been violated. In the Leman decision Mr. Chief Justice Hughes stated: "There is no question here that the respondent had made profits through the infringing sales in violation of the injunction, and the amount of the profits was ascertained, but the appellate court held that the petitioners were limited to the damages caused by such sales and that no damages had been shown. We think that the court erred in imposing this limitation. The fact that a proceeding for civil contempt is for the purpose of compensating the injured party, and not, as in criminal contempt, to redress the public wrong, does not require so narrow a view of what should be embraced in an adequate remedial award.

"While the distinction is clear between damages, in the sense of actual pecuniary loss, and profits, the latter may none the less be included in the concept of compensatory relief. In a suit in equity against an infringer, profits are recoverable not by way of punishment but to insure full compensation to the party injured . . .", 284 U. S. at pp. 455-456.

The Leman case overruled *sub silentio* Christensen Engineering Co. v. Westinghouse Air Brake Co., 135 Fed. 774, 782 (2 Cir. 1905), on which the majority relies. But the Leman decision was not overruled by United States v. United Mine Workers, 330 U. S. 258 (1947). That the Supreme Court was not focusing its attention on the issue of proof of profits as distinguished from the issue of proof of damages in the United Mine Workers case is demonstrated by the fact that the opinion in that case cites with approval in note 80, 330 U. S. cited to the text at p. 304, both the Leman case and Nostrom v. Wahl, 41 F. 2d 910, 914 (7 Cir. 1930). Leman and Nostrom are directly con-

trary in their respective rulings in relation to the issue of proof of profits in contradistinction to the issue of proof of damages.

The majority also rely on the statement in the United Mine Workers opinion that where a fine is imposed as one kind of judicial sanction in a civil contempt proceedings, "Such fine must . . . be based upon evidence of complainant's actual loss. . . ." 330 U. S. at p. 304. But the quoted statement was not dispositive of the civil contempt issue raised in United Mine Workers case for the fine imposed had as its objective coercion of compliance with the order of the court and not compensation to an injured private party. *Id.* at pp. 304-305.

By the decision in the case at bar the salutary rule that an infringer may be held accountable in an action for civil contempt for profits resulting from his violation of an injunction is brought to an end in this Circuit. At most the injured party can recover attorney's fees and costs, in a useless action in which he can receive no compensation whatsoever for the injury he has suffered.

The issue involved is one of major importance. For these reasons I am of the view that rehearing should be had before the court en banc.

I am authorized to state that Judge Maris joins in the views expressed in this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.